

FEB 19 1987

JOSEPH F. SPANGLER, JR.  
CLERK

No. 86-828

(4)

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

SOUTHWESTERN SHEET METAL WORKS, INC.,  
*Petitioner,*  
v.  
SEMCO MANUFACTURING, INC.,  
*Respondent.*

*On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
For the Fifth Circuit*

**PETITIONER'S REPLY BRIEF**

Respectfully submitted,

ROBIN P. HARTMANN  
*Counsel of Record*

NOEL M. HENSLEY

JAMES J. WILLIAMS

HAYNES & BOONE

3100 InterFirst Plaza

901 Main Street

Dallas, Texas 75202-3714

(214) 670-0550

GERALD B. SHIFRIN

5848 Cicacia Circle, Suite A110

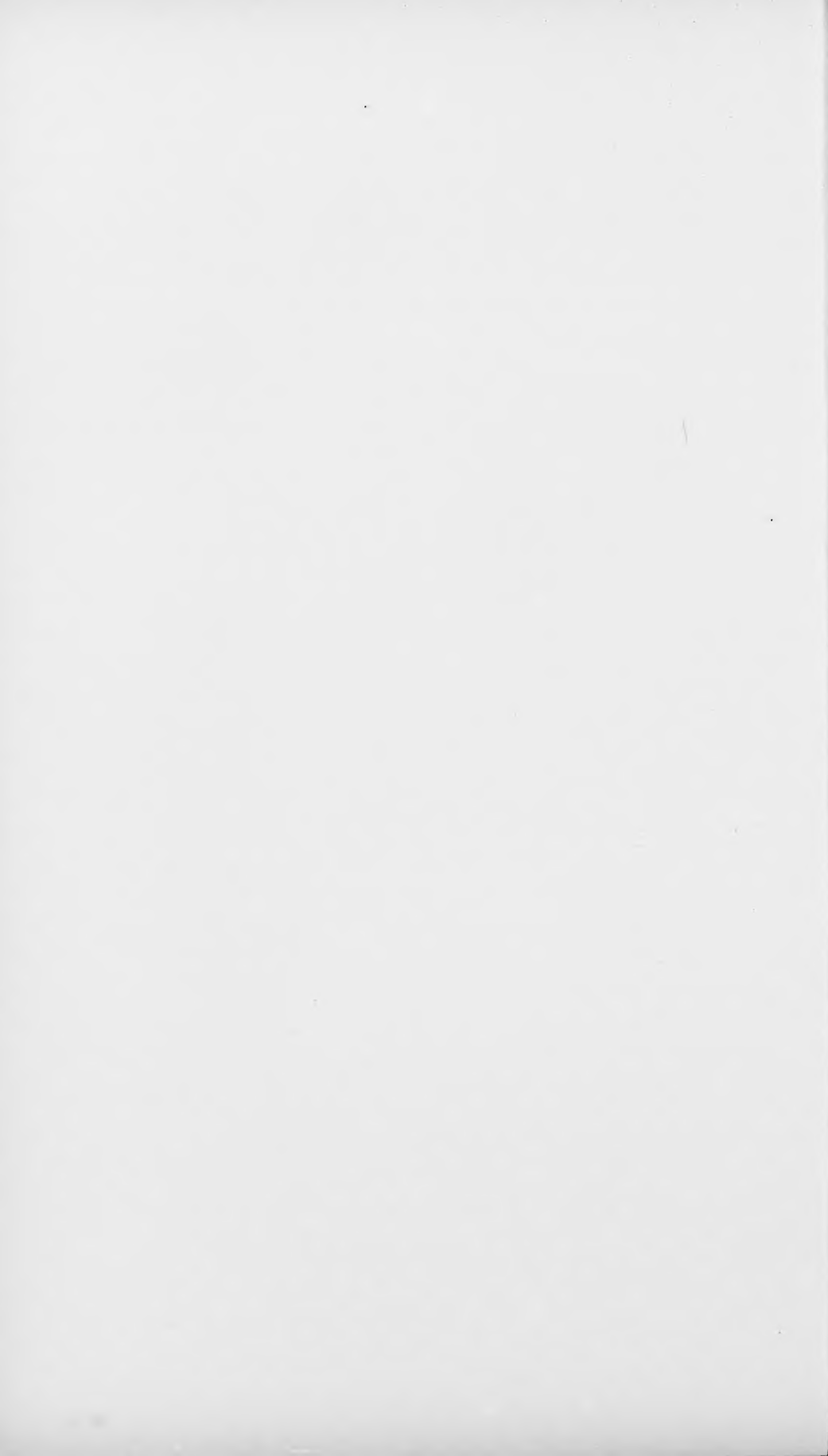
El Paso, Texas 79912

(915) 772-8300

*Counsel For Petitioner*

February, 1987

779



No. 86-828

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

---

SOUTHWESTERN SHEET METAL WORKS, INC.,  
*Petitioner,*

v.

SEMCO MANUFACTURING, INC.,  
*Respondent.*<sup>1</sup>

---

## PETITIONER'S REPLY BRIEF

In viewing this antitrust case, where a labor union was secretly allied with a competitor for anticompetitive purposes, the Fifth Circuit has fastened its reversal upon a view that the Plaintiff did not meet its burden of proof in demonstrating fact of injury. Such a view of the record and the legal standard to be applied is erroneous.

In its Opposition Brief, Respondent Semco Manufacturing, Inc. ("Semco") does not dispute the necessity for clarification of the legal standards governing a plaintiff's evidentiary burdens in establishing fact of injury. Semco tacitly concedes the existence of a split among the circuits concerning the proper evidentiary standard for proving fact of injury. Significantly, Semco does not challenge the standard set by this Court that proof of injury to a fair degree of certainty will establish

---

<sup>1</sup> A listing of parties and other interested persons, in accordance with Rule 28.1, is made by reference to the list identified in Southwestern's Petition at p. iii.

antitrust liability.<sup>2</sup> Finally, Semco does not deny that a rule requiring plaintiffs to disprove alternative causes would create insurmountable burdens for antitrust plaintiffs.

The opinion below reversed the jury's verdict for Southwestern solely because the plaintiff's proof of fact of injury did not present evidence negating third party bidders on jobs where Southwestern competed with Semco. Semco claims that this case is not the proper vehicle for reviewing the Fifth Circuit's evidentiary requirement for proving fact of injury.

Semco's characterization of the evidence, however, seriously distorts the record before this Court.<sup>3</sup> Semco principally limits its evidentiary references to facts and inferences it advanced in the trial court, and argues that "the totality of the record" supports those claims. (Opposition Brief at p. 13). The relevant record for appeal, however, confines review to the facts and inferences that *support* the jury's verdict. It is these facts that are omitted from the Opposition Brief.

The misleading factual characterizations in the Opposition Brief are evident from their comparison with some of the actual record facts that supported the jury's finding of fact of injury:

---

<sup>2</sup> Semco challenges the applicability of Southwestern's cited Supreme Court decisions to the fact of injury issue; that challenge is readily refuted by reference to those decisions, however, and need not be belabored in this Reply.

<sup>3</sup> Semco's first question presented, casting the agreement between Semco and Mesa as a labor "negotiation" (Opposition Brief at pp. i, 2), ignores the jury's finding of an unlawful conspiracy to uniquely favor Semco and thereby to disadvantage Southwestern. For purposes of this Court's review, the existence of an unlawful conspiracy is unquestioned. The only issue addressed by the Court of Appeals was whether Southwestern had sustained its burden of proving an injury from the violation.

**Semco's Factual Characterization  
In Opposition Brief**

---

Semco did not use the production worker wage advantage in estimating bids on jobs (Opposition Brief at p. 11).

There was no evidence that Southwestern would have bid lower than Semco on specific jobs absent the unlawful wage advantage (Opposition Brief at pp. 3, 4, 11, 12).

**Actual Record Evidence  
Supporting Jury Verdict**

Semco in fact used the unlawfully obtained advantage in calculating its bids (direct testimony of former Semco comptroller and budget analyst; expert testimony of economist based on Semco data).

The evidence identified (i) specific jobs on which Southwestern and Semco bid (Semco's documents, including its designation of jobs it had quoted and won; testimony of Southwestern's vice president; numerous bid documents and exhibits); (ii) the amount of actual bids submitted by Southwestern and Semco (numerous bid documents); and (iii) the amount that Semco's bids on specific jobs were affected, and adjustment to such bids by eliminating the unlawful wage advantage, establishing specific jobs on which Southwestern's originally higher bid would have been lower (expert testimony of economist; exhibit showing adjusted amounts on specific jobs).

<u>Semco's Factual Characterization In Opposition Brief</u>	<u>Actual Record Evidence Supporting Jury Verdict</u>
Southwestern's evidence on fact of damage was premised on giving Southwestern the benefit of Semco's wage advantage (Opposition Brief at p. 17).	Fact of injury was shown in part by adjusting Semco's bids by the amount of the favorable wage advantage (expert testimony of economist; exhibit).
Other competing companies also submitted competitive bids and were awarded contracts on jobs which were bid by both Semco and Southwestern (Opposition Brief at p. 3). <sup>4</sup>	Semco does not know what other manufacturers were bidding on jobs for spiral pipe (testimony of Semco's manufacturer's representative).

The factual record, by its scope and detail, provides a case well-suited to define the serious legal issues relating to proof of injury among bidding competitors.

Finally, the Fifth Circuit's holding disregarded evidence of injury other than specific lost bids. Semco ignores the independent issue of whether evidence aside from designated bids can support a finding of injury in fact to an antitrust plaintiff.

In summary, Semco does not seriously question the need to review injury in fact standards and burdens. The record evidence favorable to the jury verdict below sharply focuses these

---

<sup>4</sup> Through cross-examination, Semco's counsel attempted to suggest that on some jobs third parties may have been successful. Only hearsay evidence was directed to the issue, however, and this purported to address but a few of the numerous competitive situations before the jury. The record is straightforward that on certain jobs Southwestern's bids would have been lower than Semco's bids had the latter not used the wage advantage.

legal issues that have split the lower courts.<sup>5</sup> The evidence supports Southwestern's jury verdict, unless Southwestern must foreclose alternative sources of its injury by disproving the existence of successful third party bidders on every job. This single distinction undergirds the Fifth Circuit's decision in this case, and the record affords this Court the proper means to address and clarify the standard of proof for a private antitrust plaintiff in establishing fact of injury.

Petitioner therefore reurges this Court to review the decision of the Fifth Circuit and to grant the writ of certiorari.

Respectfully submitted,

ROBIN P. HARTMANN

*Counsel of Record*

NOEL M. HENSLEY

JAMES J. WILLIAMS

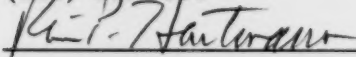
HAYNES & BOONE

3100 InterFirst Plaza

901 Main Street

Dallas, Texas 75202-3714

(214) 630-0530



GERALD B. SHIFRIN

5848 Cicacia Circle, Suite A110

El Paso, Texas 79912

(915) 772-8300

*Counsel For Petitioner*

February, 1987

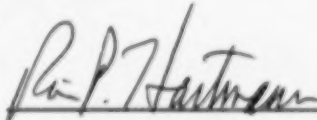
<sup>5</sup> Semco attempts to avoid review of the appellate decision by urging applicability of a labor exemption, *inter alia*, to its anticompetitive conduct. The Fifth Circuit did not accept any of these as a basis for its reversal and therefore none is before this Court. The factual record, as well as arguments and authorities, support the rejection below of Semco's contentions on these separate issues.

**CERTIFICATE OF SERVICE**

The undersigned, a member of the bar of the United States Supreme Court, has served the foregoing Petitioner's Reply Brief on Respondent's counsel of record by mailing copies to the following persons on February 19, 1987:

W. B. West, III  
Clark, West, Keller, Butler & Ellis  
4949 Renaissance Tower  
Dallas, Texas 75270-2146

James T. McNutt, Jr.  
Scott, Hulse, Marshall, Feuille,  
Finger & Thurmond  
11th Floor  
Texas Commerce Bank Building  
El Paso, Texas 79901



---

ROBIN P. HARTMANN

*Counsel of Record for Petitioner*



